Supreme Court, U.S.
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97-1233

In The

Supreme Court of the United States

October Term, 1997

RON PAUL, SR., ANGELA PAUL, RON PAUL, JR., BRIAN PAUL, STEPHEN PAUL,

Petitioners,

v.

A. LEVY & J. ZENTNER CO., a California Corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Respondent disagrees with the statement of questions presented for review in the Petition.

The sole question presented for review is whether the Court should exercise its discretion to grant the petition, when the petitioners have not shown any conflict in the Circuit courts over the applicability of the standards of *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993) (hereafter "*Pioneer Investment*" or "*Pioneer*"), to cases interpreting rule 8002(c) of the Federal Rules of Bankruptcy Procedure, or any misapplication of the *Pioneer* case by the courts below.

PARTIES TO THE PROCEEDING

The parties to this proceeding are accurately described in the Petition. Respondent A. Levy & J. Zentner Co. is a California corporation. It has never issued shares to the public. It has no parent companies, subsidiaries or affiliates which have issued shares to the public.

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STATEMENT OF THE CASE

Petitioners are the general partners of a Debtor operating under a Chapter 11 plan of reorganization. The plan was confirmed by the bankruptcy court in the Eastern District of California in January of 1994. Respondent is one of the creditors whose claims were treated in the confirmed plan.

On February 1, 1995, Petitioners filed suit against Respondent in the Superior Court of California, in Fresno County. On February 27, 1995, Respondent removed that lawsuit to the bankruptcy court which had confirmed the partnership's Chapter 11 plan.

The next day, Respondent filed a motion under Fed.R.Civ.P. 12(b) and Fed.R.Civ.P. 56(b) for summary judgment and for dismissal of the complaint, on the ground that confirmation of the Chapter 11 plan operated as a res judicata preclusion of all of the Petitioners' claims alleged in the complaint. Petitioners opposed the motion. At a hearing on April 24, 1995, the bankruptcy court granted the motion and ordered the case dismissed. A written order granting summary judgment and a written judgment dismissing the case were filed on April 26, 1995. The judgment was entered on April 27, 1995.

On May 19, 1995, 22 days after entry of the judgment, Petitioners filed a notice of appeal from the judgment. Concurrently, Petitioners filed a motion to extend their time to file a notice of appeal.[1]

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[1] Rule 8002(a), Federal Rules of Bankruptcy Procedure, requires that a notice of appeal from a bankruptcy court judgment be filed within ten (10) days of entry of the judgment.

In support of their motion, Petitioners filed a declaration of their counsel, in which he admitted receiving written notice of entry of the judgment on April 28, 1995.[2] He further declared that his secretary did not know the time limit for appealing a bankruptcy court order, which caused the deadline for filing the notice of appeal to be miscalendared. By an order entered on June 30, 1995, the bankruptcy court denied the motion for leave to file the late appeal.

Petitioners filed a timely Notice of Appeal from that order on July 3, 1995. The appeal was assigned to the district court for the Eastern District of California. The district court heard oral argument on the appeal on May 20, 1996. At that time, the district court judge asked Petitioners' counsel to provide any further explanation why he missed the deadline. He failed to do so, admitting he did not know the time limitations imposed by the Bankruptcy Rules. He said his secretary calendared the appeal deadline as though State Court time limits were applicable.

The district court issued a Memorandum Opinion and Order affirming the bankruptcy court's ruling on May 23, 1996. Petitioners appealed. The Court of Appeals for the Ninth Circuit issued a Memorandum Order on August 27, 1997, affirming the district court's ruling.

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[2] Petitioners' present counsel was not their attorney in any of the cases below.

REASONS FOR DENYING THE PETITION FOR CERTIORARI

There Is No Conflict In The Circuit Courts Over The Applicability Of Pioneer Investment To Rule 8002 Of The Federal Rules of Bankruptcy Procedure.

Rule 10 of this Court's Rules provides, in pertinent part:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> > (a) a United States court of appeals has entered a decision in conflict with the decision of another court of appeals on the same important matter. . .

In applying Rule 10, a principal purpose of certiorari jurisdiction is to resolve conflicts among the courts of appeal concerning the meaning of provisions of federal law. *Braxton v. United States* 500 U.S. 344, 348, 111 S.Ct. 1854, 1857, 114 L.Ed.2d 385 (1991).

Petitioners assert that the circuit courts are in conflict over the applicability of the "excusable neglect" standards of the *Pioneer* decision to cases involving Bankruptcy Rule

8002(c). Despite this assertion, Petitioners fail to cite any circuit court decisions which are in conflict.

Petitioners cite two circuit court cases to support their argument about a conflict among the circuits over the applicability of *Pioneer* to cases involving Rule 8002(c). Only one of the cases, *Christopher v. Diamond Benefits Life Ins. Co.*, 35 F.3d 232 (5th Cir. 1994), involves Rule 8002(c). In *Christopher*, the Fifth Circuit simply stated that the *Pioneer* standards apply to a motion for leave to file a late appeal, and that the case should be remanded for factual findings which justified the granting of the motion to extend time. 35 F.3d at p. 236.

Petitioners also cite *Kyle v. Campbell Soup Co.*, 28 F.3d 928 (9th Cir. 1994), *cert. denied* 513 U.S. 867, 115 S.Ct. 185, 130 L.Ed.2d 119 (1994). This case did not involve Rule 8002(c); rather it construed Federal Rule of Civil Procedure 6(b), which is similar to Rule 8002(c). In discussing *Pioneer*, the Ninth Circuit concluded that the type of excusable neglect which occurred in *Pioneer* was not present, where appellant's counsel was mistaken in his interpretation of an unambiguous rule.

Petitioners also cite a number of bankruptcy court decisions which have analyzed the excusable neglect issue. None of those cases supports the theory espoused by Petitioners, which is that their previous attorney's ignorance of an unambiguous rule amounted to excusable neglect.

Consequently, Petitioners have failed to demonstrate any conflict among the circuits. Since there is no conflict among the circuits, the Court should deny the Petition.

The Ruling By The Ninth Circuit Court Did Not Decide An Important Federal Question In A Way That Conflicts With Relevant Decisions Of This Court.

Rule 10 of this Court's rules further provides, in pertinent part:

> (c) . . . a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court . . .

Petitioners' second argument appears to focus on a perceived misinterpretation of *Pioneer* by the Ninth Circuit, which could arguably meet Rule 10(c)'s standard. Petitioners complain that the Court of Appeal, the district court and the bankruptcy court all focused on the fact that the only reason given for the late appeal was their own counsel's ignorance of the deadline imposed by Rule 8002(c).

This position is clearly in conflict with the *Pioneer* decision itself. Under *Pioneer*, the factors to be considered are (1) danger of prejudice to the non-movant, (2) length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay and whether it was in the reasonable control of the movant and (4) whether the movant acts in good faith. 507 U.S. at 395, 113 S.Ct. at 1498.

In addition, *Pioneer* discusses a fifth factor, which is whether clients should be penalized for their counsel's mistake or neglect, with the focus "upon whether the neglect of respondents and their counsel was excusable", because clients

are held accountable for the acts and omissions of their counsel. 113 S.Ct. at 1499. Most significantly, *Pioneer* provides that "[i]gnorance of the rules, or mistakes construing the rules do not usually constitute 'excusable neglect.' " 113 S.Ct. at 1496.

Petitioners have failed to show any misapplication of *Pioneer* to this case by any of the courts below. Rule 8002(a) is clear and unambiguous. Petitioner's former counsel never claimed to be confused over the meaning of the rule; rather, his problem was that he simply did not know the rule existed.

In exercising its discretion, the bankruptcy court held Petitioners accountable for the acts and omissions of their previous counsel. The district court and the Circuit court's opinions did not find any abuse of that discretion. Although *Pioneer* may not have been applied the way the Petitioners wanted it to be, it was applied properly.

In the three years which have ensued since the underlying litigation was commenced, Petitioners have never shown any evidence of excusable neglect; instead, they demonstrated only their attorney's ignorance. That ignorance by itself is not "excusable neglect," to allow relief from his failure to file a timely notice of appeal. *Pioneer*, 113 S.Ct. at 1496.

Since the Circuit Court properly applied *Pioneer* to this case, the Petition should be denied.

CONCLUSION

Petitioners have failed to demonstrate any conflict in the circuit courts, or any misapplication of the *Pioneer* decision by the courts below. They have also failed to demonstrate any compelling reason for the Court to grant the Petition. Accordingly, certiorari should be denied.

Respectfully submitted,

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